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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 709

TONY TUDRYCK and MARY TUDRYCK, his wife,
Petitioners,

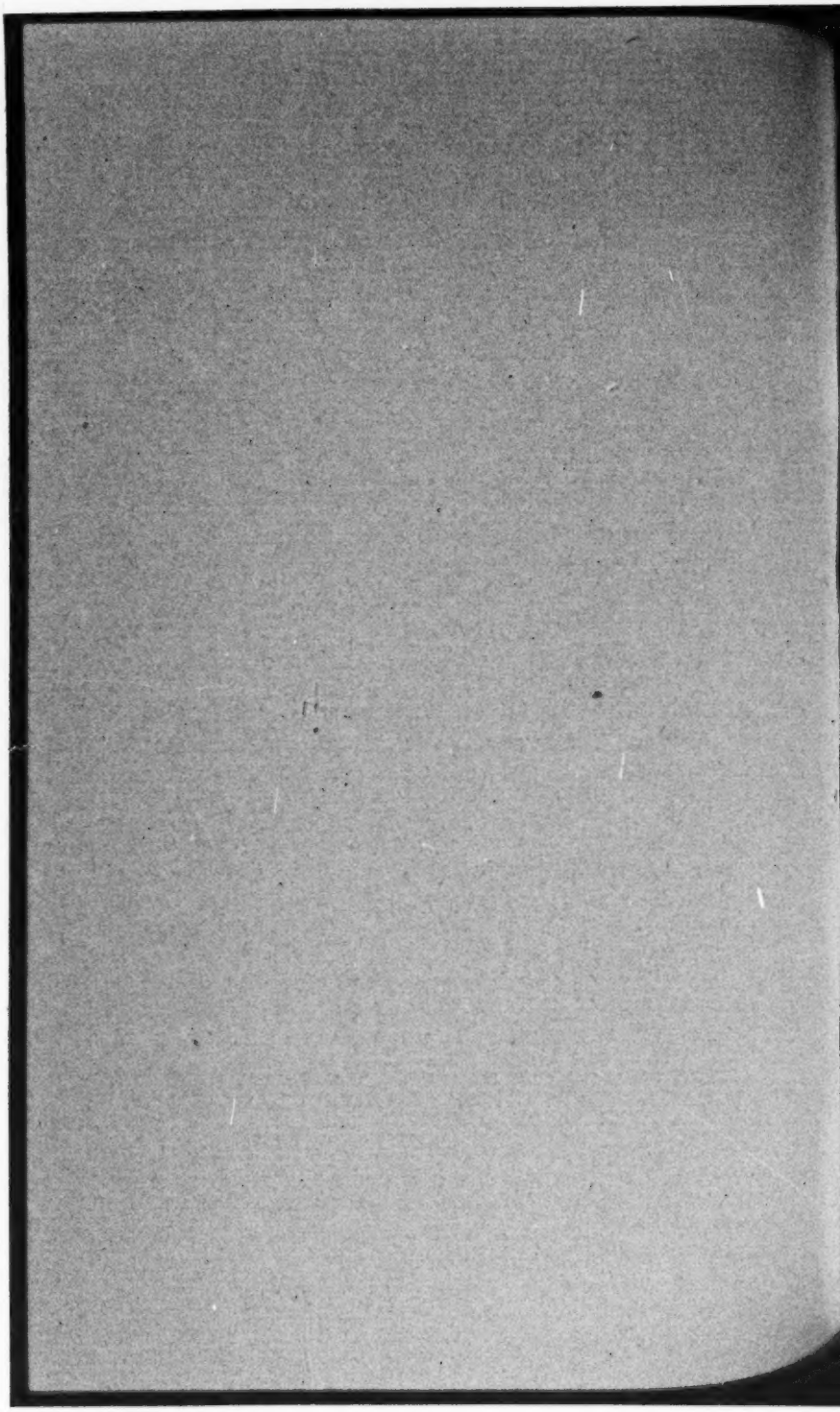
vs.

JOSEPH MARTIN, Receiver of the Sterling Bank of Sleeper and Chamberlain, et al.,
Respondents.

RESPONDENT'S BRIEF URGING THAT CERTIORARI BE DENIED

EDWARD A. BILITZKE,
Counsel for Joseph Martin, Receiver of Sterling Bank of Sleeper and Chamberlain, *Respondent.*
Business Address:
West Branch, Michigan.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN



SUBJECT INDEX

Page

Opinion Below 2
Challenge of Grounds of Jurisdiction 2
Questions Presented by Petition 3
Counter-Statement of Facts 4-20

Argument

A. That the Judgment and Decision of the Michigan Supreme Court was based upon Non-federal Grounds 21

Federal Question must appear Affirmatively from the Record 23
No Constitutional Questions Involved 24
This Court has refused Appeal from Final Decree based upon Compromise Agreement 27
There was Due Process of Law 27
The Decree was Responsive to the Issues Tendered by the Pleadings 30

B. The Michigan Supreme Court Found no State or Federal Constitutional Questions Involved in the case 31

C. This Court has no jurisdiction based upon Acts of Congress for the reason that this suit does not infringe upon any title, right, privilege or immunity specially set up or claimed by petitioners under the constitution * * * or statute of * * * the United States. The 14th Amendment to the Federal Constitution has reference to State Action Exclusively, and is not applicable in the instant case which involves only claims of private individuals 34

The 14th Amendment to the Federal Constitution not applicable to this case 34

D. That the findings of the State Court on Question of Jurisdiction, Pleadings, Practice and Procedure, Doctrine of Laches, Limitation In re Rehearing, Construction, Application and Effect of State Constitutional Provisions and Laws are all binding upon this Court and are not proper questions for review 37

SUBJECT INDEX
(Continued)

Page

(a) Jurisdiction of state court 37
(b) State pleadings 38
(3) State practice and procedure 38
(d) Doctrine of laches 38
(e) Limitation of time for making application for rehearing in state court 39
(f) Construction, Application and Effect of State Constitution and Laws 39

E. Tudrycks' Petition does not Present for Review a Federal Question of Substance. Questions urged are frivolous, entirely lacking in substance and color of merit 40

No Federal Question of Substance 40
Questions urged are Frivolous, Entirely Lacking in Substance and Color of Merit 40
Conduct of Attorney Harry J. Lippman 42

Facts Mis-Stated in Petitioners' Brief 44
Analysis of other Questions Raised and Authorities Cited in Petitioners' Brief 50

Was the court without Jurisdiction due to want of due process (Page 14 of Brief) 51
Did the court have jurisdiction of the person (Switzer, Receiver), (Page 27 of Brief) 52
Jurisdiction was not conferred by consent (Page 32 of Brief) 52
Tudrycks' Bill of Complaint was not filed to foreclose mortgage (Brief, page 26) 52
Is the 14th Amendment to Federal Constitution — equal protection of law — applicable to this case (Page 38 of Brief) 53

Conclusion 54

TABLE OF CASES

	Page
Arrowsmith vs. Harmoning, 118 U. S. 194; 30 Law Ed. 243	29
Baldwin vs. Kansas, 129 U. S. 52; 32 Law. Ed. 640	39
Berea College vs. Kentucky, 211 U. S. 45, 53 Law. Ed. 81, 85	24
Bergemann vs. Backer, 157 U. S. 655	33
Bledsoe vs. Seamann, 77 Kan. 679, 95 P. 576	44
Bracklow vs. Bracklow, 310 Mich. 201	24
Brinkmeier vs. Missouri Pac. R. Co., 224 U. S. 268, 56 Law. Ed. 758	38
Castillo vs. McConnico, 168 U. S. 674	33
Central Land Co. vs. Laidley, 159 U. S. 112	33
Civil Rights Cases, 109 U. S. 3, 27 Law. Ed. 836	35
Commonwealth of Virginia, Ex Parte, 100 U. S. 313, 25 Law. Ed. 667	35
Corrigan vs. Buckley, 70 Law. Ed. 972, 271 U. S. 322	28, 35
Davidson vs. New Orleans, 96 U.S. 97, 24 Law. Ed. 616	28
Dean vs. Dean, 136 Oregon 694; 86 A. L. R. 82	44
Enterprise Irrig. Dist. vs. Farmers Mut. Canal Co., 243 U. S. 157, 61 Law. Ed. 644	24
Eustis vs. Bolles, 150 U. S. 370	33
Fortunato vs. DiFlippo, 256 Mich. 545	27
Fox Film Corp. vs. Muller, 296 U. S. 207, 80 Law. Ed. 158	24
French vs. Hopkins, 124 U. S. 524, 31 Law. Ed. 536	37
Furness, Withy & Co. vs. Yanz-Tske Ins. Asso., 242 U. S. 433, 61 Law. Ed. 415	27
Gallup vs. Schmidt, 183 U. S. 307, 22 Sup. Ct. Rep. 164	28
Goldsmith vs. George G. Prendergast Const. Co., 252 U. S. 12, 64 Law. Ed. 427	38
Great Western Telegraph Co. vs. Purdy, 162 U. S. 329, 40 Law. Ed. 987	39
Hamblin vs. Western Land Co., 147 U. S. 531	33
Head vs. Amoskeag Mfg. Co., 113 U. S. 9, 26	33
Herb vs. Pitcairn, 89 Law. Ed. 794, 324 U. S. 124	24

TABLE OF CASES
(Continued)

	Page
Hodges vs. McDuff, 76 Mich. 303	27
Horning vs. Saginaw Circuit Judge, 161 Mich. 413	27
Kelly vs. Heinzelman, 311 Mich. 474	27
Kersh Lake Drainage District vs. Johnson, 84 Law. Ed. 881, 309 U. S. 485	37
King vs. Mullins, 171 U. S. 404, 43 Law. Ed. 214	28
Lee vs. Central of Georgia Ry. Co., 252 U. S. 109, 64 Law. Ed. 482	38
Leo vs. Meyerhoven, 247 Mich. 490	27
Livingston vs. Livingston, 276 Mich. 399	24
Louisiana vs. Resweber, 91 Law. Ed. 422, 329 U. S. 459	39
Lowe vs. Schuyler, 187 Mich. 526	27
Lynde vs. Lynde, 181 U. S. 183, 45 Law. Ed. 810	28
Lynch vs. New York, Ex Rel Pierson, 79 Law. Ed. 191, 293 U. S. 52	23
McGowan vs. Parish, 237 U. S. 285, 59 Law. Ed. 956	31, 51
Meredith, In re Estate of, 275 Mich. 278	21
Moran vs. Horsky, 178 U. S. 205, 44 Law. Ed. 1038	39
Morley vs. Lake Shore & M. S. Railroad Co., 146 U. S. 162, 171	33
Murdock vs. Memphis, 20 Wall. (U. S.) 590, 636, 22 Law. Ed. 429, 444	24
National Foundry & Pipe Works vs. Oconto City W. Supply Co., 183 U. S. 216, 46 Law. Ed. 158	38
Norvell vs. McHenry, 1 Mich. 227	32
Pacific Gas & Electric Co. vs. Police Court of City of Sacramento, 251 U. S. 22, 64 Law. Ed. 112	37
Paul vs. Virginia, 8 Wall, 168 (75 U. S. XIX 357)	36
Pierce vs. Somerset Railway, 171 U. S. 641, 43 Law. Ed. 316	39
Remington Paper Co. vs. Watson, 173 U. S. 451, 43 Law Ed. 765	33
Reynolds vs. Stockton, 140 U. S. 268, 35 Law. Ed. 469	30, 50
Rouse, Hazard & Co. vs. Circuit Judge, 104 Michigan, 235	28
Russell vs. White, 63 Mich. 409	27

TABLE OF CASES
(Continued)

	Page
Sawyer vs. McAdie, 70 Mich. 388	24
Spencer vs. Merchant, 125 U. S. 345, 31 Law. Ed. 753	28
Stadelman vs. Miner, 246 U. S. 544, 62 Law. Ed. 875	36
Standard Oil Company vs. Missouri, 224 U. S. 270	50
St. Louis, C. G. & Fort Smith R. Co. vs. Missouri, (Merriam), 156 U. S. 478	33
Turner vs. Board of Commissioners, 173 U. S. 461, 43 Law. Ed. 768	39
United States vs. Harris, 106 U. S. 629, 27 Law. Ed. 295	35, 36
United States vs. Pink, 86 Law. Ed. 797, 315 U. S. 203	38
Virginia vs. Rives, 100 U. S. 313, 25 Law. Ed. 667	35
Walker vs. Sauvinet, 92 U. S. 90, 23 Law. Ed. 678	28, 29, 33
Western & Southern Life Ins. Co. vs. Brana, 275 Mich. 19	24
Wilson vs. Standefer, 184 U. S. 415, 46 Law. Ed. 619	28
Wyatt vs. Sweet, 48 Mich. 540	27

TEXT BOOKS CITED

Corpus Juris, Vol. 53, page 95-96	32
Corpus Juris (Constitutional Law), Vol. 12, Sec. 959	37
Freeman on Judgments, (5th Ed.), page 2963	44
Searl Michigan Practice—	
Sec. 1313	25
Sec. 1266	25
Sec. 1315	25
Sec. 1151	25

STATUTES CITED

Michigan Constitution, Sec. 16, Article II	27
Judicial Code, Sec. 237, as amended by Act of Sept. 6, 1916 (39 Stat. at L. 726, Chap. 448, Comp. Stat. 1916, Sec. 1207)	36

COURT RULES CITED

Page

Michigan Court Rules 28 and 48 ..... 22, 26

United States Supreme Court Rule 38, Par. 5, sub. a .. 40

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No. 709

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vs.

JOSEPH MARTIN, Receiver of the Sterling Bank of Sleeper and Chamberlain, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION

NOTE

Petitioners supplement to the record in the Michigan Supreme Court is pages 271 to 282. This results in a duplication in page numbers in this record.

The record before the Supreme Court of State of Michigan consisted of two volumes namely:

"Record on Appeal" pages 1 to 270.
"Volume of Exhibits" pages 271 to 534.

Petitioners supplement to the record, we believe should have been numbered commencing with page 535.

To save confusion, we add "Supplement" when referring to matters in the Supplement to the State Record.

OPINION BELOW

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

The opinion of the Supreme Court of the State of Michigan (275-281 of Supplement) decided January 6, 1948, is reported in 320 Michigan Reports, pages 99-108. The motion of Tony Tudryck and Mary Tudryck, present petitioners, filed October 31, 1944, to vacate decree entered in the state court on January 25, 1940 (125), as well as the motion to vacate the same decree filed August 16, 1944 by Andrew Smyl and Victoria Smyl, defendants in the original cause (107), were heard as one case in the Michigan Supreme Court and are therefore covered by the one opinion of the Michigan Supreme Court. Opinion of the trial court (The Circuit Court for the County of Arenac, State of Michigan, In Chancery), appears at page 207 of the Record.

The petition of Andrew Smyl and Victoria Smyl for Writ of Certiorari to the Supreme Court of the State of Michigan, No. 710, is now here before this honorable court for consideration.

CHALLENGE OF GROUNDS OF JURISDICTION

We urge that there was no basis for the filing of the present petition for the following reasons:

A.

That the judgment and decision of the Michigan Supreme Court was based upon Non-federal grounds (281).

B.

That the Michigan Supreme Court found no State or Federal Constitutional questions involved in said cause (281).

C.

This court has no jurisdiction based upon Section 237 (b) of Chap. 229, 43 Stat. 936 as amended by Congress

(page 9 of Petition) for the reason that this suit does not infringe upon *any title, right, privilege or immunity* specially set up or claimed by said petitioners under the constitution, * * * or statute of * * * the United States. The 14th amendment to the Federal constitution has reference to state action exclusively, and is not applicable in the instant case which involves only claims of private individuals.

D.

That the findings of the Supreme Court of Michigan on the question of jurisdiction of the subject matter and of the parties, application and construction of rules of practice in said state, application of the doctrine of laches, determination of facts, application of the local rules limiting the time in which applications for rehearing must be filed, and application and construction of the statute of amendments of said state and prior decisions of said state Supreme Court, are all binding upon the United States Supreme Court and are not proper questions which this court will review.

E.

The petition does not present for review a *Federal question of substance* as required by subdivision a, of Paragraph 5, Rule 38 of Rules of Supreme Court of United States. The questions urged by the petitioners, when viewed in light of the record in this case, are *frivolous* and entirely *lacking in substance* or *color of merit.*

QUESTIONS PRESENTED BY PETITION

That the order of the trial court denying said motion, together with the decision of the Supreme Court of the State of Michigan, violates the 14th Amendment of the Constitution of the United States (*due process of law* — and — *equal protection of the laws* — (page 10 of the Petition)).

COUNTER-STATEMENT OF FACTS

The Statement of Facts as set forth in the Petition for Writ of Certiorari is *grossly* inaccurate and erroneous. Material facts are omitted and matters of argument are made to appear as facts. For that reason it becomes necessary for Respondent to submit this Counter-Statement of Facts.

Bill of Complaint sworn to by Tony Tudryck and Mary Tudryck on August 15, 1938, filed August 16, 1938, was prepared and is counter-signed by Harry J. Lippman as their attorney, and bears the following title:

> "Tony Tudryck and Mary Tudryck, his wife,
> Plaintiffs,
>
> vs.
>
> J. O. Mutch, whose first name is unknown, but whose person is well known, individually and as Cashier of the Sterling Bank of Sterling, Michigan, also known as the Sterling Bank of Sleeper and Chamberlain, also known as the Sterling Bank, and Harvey A. Chamberlain and J. O. Mutch, whose first name is unknown but whose person is well known, and John Doe and Richard Roe and Jane Doe and Mary Roe, whose correct names are unknown, but whose persons are well known, individually and as co-partners doing business as the Sterling Bank of Sterling, Michigan, also known as the Sterling Bank of Sleeper and Chamberlain, also known as the Sterling Bank and Andrew Smyl, also known as Andrew Smaiel, and Victoria Smyl, also known as Victoria Smaiel, his wife,
> Defendants" (4).

Exhibit A, attached to said Bill of Complaint is land contract dated March 1, 1934 between J. O. Mutch, Cashier of Sterling Bank of Sterling, Michigan, first party and Tony and Mary Tudryck, husband and wife, second parties, and evidenced the sale and purchase of farm property in the Township of Deep River, Arenac County, Michigan, consisting of 140 acres for a consideration of $3,000.00 (27).

Paragraph VI of said Bill of Complaint alleges the following:

> "VI. Your plaintiffs further show that subsequent to the 22nd day of November, A. D. 1924, your plaintiffs herein, with the full knowledge of said defendant J. O. Mutch, as cashier of said bank and of the said bank so legally constituted as aforesaid, *did purchase from the said defendants Andrew Smyl, also known as Andrew Smaiel, and Victoria Smyl, also known as Victoria Smaiel, his wife,* all their right, title and interest in and to the lands and premises hereinbefore described, your plaintiffs herein from then hitherto, and except as hereinafter in this Bill of Complaint set forth, having themselves occupied and farmed said lands" (10).

In said Bill of Complaint Tudrycks alleged that they were *"the owners of the fee"* of said real estate and premises. (Paragraph I of Bill of Complaint, R. 5).

In said Bill of Complaint Tudrycks alleged that they had completely discharged all of their indebtedness to said bank and asked for an *accounting* to show such facts (Paragraph IX, R. 16 and 17).

Paragraph XIV of said Bill of Complaint alleges the following:

> "And your plaintiffs here join in this proceeding defendants Andrew Smyl, also known as Andrew Smaiel, and Victoria Smyl, also known as Victoria Smaiel, his wife against whom no personal relief is sought except that the deed which they and your plaintiffs did at the time of their purchase from said defendants [illegible] of the latters' interest in said premises aforesaid and which said deed your plaintiffs did subsequently at the request of said defendant J. O. Mutch deliver over unto him as cashier of said defendant bank, so legally constituted as aforesaid, be by decree established as having been given as security only, *in order that the record title of your plaintiffs in said lands be fully established"* (22).

The bill of complaint prayed for the following relief:

1. * * * "*a true, full and complete accounting* with your plaintiffs for each and every item of obligation and credit existing between them and your plaintiffs, and whether arising during the time that your plaintiffs and said defendants Smyl were joint owners of the premises in this cause involved, or subsequent thereto" (Paragraph E, R. 25).

2. Cancellation of all indebtedness and judgment for damages because of actions on the part of defendants (Paragraph F., R. 25).

3. "That *each and every cloud* upon the title to the premises in this cause involved, *by reason of the conveyances now of record, or not of record,* be decreed removed therefrom, and that this Court decree *that your plaintiffs herein be the owners of the fee of the premises* in this cause involved, free, clear and discharged of all obligations unto said defendants Harvey A. Chamberlain, J. O. Mutch, John Doe and Richard Roe, Jane Doe and Mary Roe, whether individually or as co-partners doing business as the Sterling Bank of Sterling, Michigan, also known as the Sterling Bank of Sleeper and Chamberlain, also known as the Sterling Bank, and defendant J. O. Mutch, both in his individual capacity and as cashier of said bank" (Paragraph G, R. 25).

4. "That your plaintiffs may have such other, further and different relief in the premises as equity may require and to this Honorable Court may seem meet" (Paragraph H, R. 26).

The court summons, taken out by Harry J. Lippman, attorney for plaintiffs at the time the suit was commenced, and which was thereafter personally served upon all defendants, contained the following underwriting prepared by Harry J. Lippman, and by him signed (33), namely:

"UNDERWRITING: A personal decree is being sought against the defendants for injunctive relief, *accounting, removal of clouds from title to real estate,* decree of deed as mortgage security, decree of

land contract as memorandum of indebtedness, and money decree'' (33).

On August 16, 1938 the Hon. John C. Shaffer, Circuit Judge, authorized the issuance of the injunction (27). The summons, true copy of bill of complaint, and injunction were personally served upon each of the defendants within the time required by Michigan law, as follows:

1. J. O. Mutch, individually and as cashier of Sterling Bank of Sterling, Michigan, also known as Sterling Bank of Sleeper and Chamberlain, also known as Sterling Bank, served with:

(a) Summons (33-34).
(b) True copy of bill of complaint (38-39).
(c) Injunction (43).

2. Harvey A. Chamberlain individually and doing business as Sterling Bank of Sterling, Michigan, also known as Sterling Bank of Sleeper and Chamberlain, also known as the Sterling Bank, served with:

(a) Summons (34-35).
(b) True copy of bill of complaint (37-38).
(c) Injunction (42-43).

3. Andrew Smyl, also known as Andrew Smaiel and Victoria Smyl, also known as Victoria Smaiel, served with:

(a) Summons (35-36).
(b) True copy of bill of complaint (36-37).
(c) Injunction (44).

The injunction restrained all of the defendants from selling, assigning, disposing of and/or encumbering said property, or attempting the same, or taking, having or exercising any ownership and/or control over said premises and from trespassing thereon, or from taking any proceedings whatsoever to cause a forfeiture or termination of the so-called land contract (41).

On August 27, 1938, attorney Harry E. Converse of Standish, Michigan, filed his written appearance in behalf of J. O. Mutch and Harvey A. Chamberlain (45).

On October 3, 1938 J. Otis Mutch and Harvey A. Chamberlain, through attorney Harry E. Converse, filed answer and cross bill (45-71).

The answer and cross bill reviewed the indebtedness due and owing said bank on the part of plaintiffs and alleged that at the time said contract was entered into between said bank and Tudrycks on March 1, 1934 that Tudrycks' indebtedness to the bank was a great deal more and that the "bank was cutting down their indebtedness for the purpose of assisting them in saving their premises * * *" (54).

The cross bill asked for the following relief:

(a) Accounting;
(b) Payment of the amount found due.
(c) Upon default of payment foreclosure and sale.
(d) Judgment for deficiency (69-70).

On October 21, 1938, plaintiffs Tudryck filed answer to cross bill, by them signed, alleging that all of the indebtedness to said bank had been paid in full (Paragraph 5, R. 77), and that an *accounting* will disclose that the mortgages asked to be foreclosed have all been fully paid, satisfied and discharged (Paragraph 19, R. 79-80).

On October 21, 1938 attorney Harry J. Lippman, acting for plaintiffs Tudryck entered the default of Andrew Smyl and Victoria Smyl, in accordance with Michigan practice, by filing the following:

(a) Affidavit of Non Appearance of defendants Smyl signed by Harry J. Lippman;

(b) Affidavit of Regularity as to defendants Smyl signed by Harry J. Lippman;

(c) Order Pro Confesso as to defendants Smyl (82-85).

On October 8, 1938 bill of complaint was filed in the said Circuit Court for the County of Arenac, In Chancery,

by officers of three school districts praying for the appointment of a receiver of said Sterling Bank of Sleeper and Chamberlain (234-235, also 528). On October 14, 1938 Joseph Martin was appointed temporary receiver of all the assets, estates and effects both real and personal of said Sterling Bank of Sleeper and Chamberlain and on October 18, 1938, qualified by filing bond as such receiver (235, 528). Said appointment was made by the Hon. John C. Shaffer, Circuit Judge.

On November 7, 1938 said Joseph Martin, Receiver, filed petition to intervene in said Tudryck case, alleging his appointment as temporary receiver and the filing of his bond (85). The petition to intervene was prepared and presented by attorney Harry E. Converse of Standish, Michigan. In addition to said petition, stipulation was signed by Harry J. Lippman, attorney for plaintiffs, and Harry E. Converse attorney for defendants J. O. Mutch and Harvey A. Chamberlain, dated October 26, 1938 consenting that Joseph Martin, temporary receiver be allowed to intervene as a party defendant (87).

On November 5, 1938 Order For Intervention was signed by the Hon. John C. Shaffer, Circuit Judge, which reads in part, as follows:

> "It is ordered that said Joseph Martin, as receiver aforesaid be and is hereby granted permission to intervene in said cause as a defendant therein; and that within fifteen days from this date said intervenor shall file his answer therein and serve a copy thereof upon the attorney for plaintiff and also upon the attorney for all defendants who up to that time shall have appeared in said cause" (88).

On November 7, 1938, Joseph Martin, Receiver, adopted as his pleadings the Answer and Cross bill of defendants J. O. Mutch and Harvey A. Chamberlain (88-89).

On December 13, 1938, after hearing in open court at Standish, Michigan, order was entered by the Hon. John C. Shaffer, Circuit Judge, appointing H. L. Switzer, permanent Receiver of said bank and he qualified on December 15, 1938 by filing bond (236, 528).

On December 13, 1938 H. L. Switzer, Receiver, petitioned said Circuit Court for authority to employ Yeo and Bilitzke as attorneys in said receivership proceeding and order was entered on December 13, 1938 by the Hon. John C. Shaffer, Circuit Judge, in accordance with that petition (236, 528).

On January 12, 1939 there was filed in the general receivership cause No. 861, consent by Harry E. Converse, attorney for temporary Receiver, to the order appointing Yeo and Bilitzke, attorneys for the permanent Receiver (237).

On January 12, 1939, there was filed in the General Receivership cause, order signed by Judge Shaffer dated January 3, 1939 substituting Yeo and Bilitzke, attorneys for H. L. Switzer, permanent receiver, in the place of Harry E. Converse, attorney, (237, 528).

On January 12, 1939 there was filed in the General Receivership cause employment of Yeo and Bilitzke, attorneys for H. L. Switzer, Receiver, dated December 13, 1938 (237).

On January 12, 1939 there was filed in said General Receivership cause appearance of Yeo and Bilitzke, attorneys for H. L. Switzer, Receiver, dated December 13, 1938 (237, 529).

On January 17, 1939 Harry J. Lippman, attorney for Tudrycks, and Yeo and Bilitzke, attorneys for H. L. Switzer, Receiver, entered into stipulation to the effect that the said cause instituted by Tudrycks against said J. O. Mutch and others, be adjourned to the March term of said court (89).

Based upon that stipulation, Order was signed by the Hon. John C. Shaffer, Circuit Judge, dated January 24, 1939, adjourning said cause to the March term of said court (89-90).

On June 8, 1939, Harry J. Lippman, attorney for Tudrycks, gave notice to produce upon the trial certain letters therein referred to, and served same upon "Harry E. Converse, attorney of record for J. O. Mutch and Harvey A. Chamberlain, and upon Yeo and Bilitzke, attorneys

of record for H. L. Switzer, Receiver," same having been filed on June 9, 1939 (90-91).

On June 14, 1939, this case came on for trial at Standish, Arenac County, Michigan, before the Hon. John C. Shaffer, Circuit Judge.

Appearances were as follows:

Mr. Harry J. Lippman, attorney for Tony Tudryck and Mary Tudryck.

Mr. Harry E. Converse, appearing for J. O. Mutch and Harvey A. Chamberlain.

Yeo and Bilitzke by Mr. Bilitzke, appearing for the Receiver of the Sterling Bank of Sleeper and Chamberlain.

(Opening Statements of Counsel together with Testimony Taken appears at pages 311-504 of the Record).

At the opening of that trial, the following occurred:

Attorney Edward A. Bilitzke then stated upon the record in open court that he appeared for the permanent receiver (311-312).

Attorney Harry E. Converse then stated upon the record that defendants Mutch and Chamberlain had no interest in the subject matter of the suit and that the property belonged to the bank (311-312).

Mr. Harry J. Lippman, attorney for Plaintiffs Tudrycks, then proceeded with the introduction of testimony. The first witness called was Mrs. Avis Black, Register of Deeds of Arenac County, Michigan, who identified the several conveyances, contracts, mortgages, etc., that were referred to in the plaintiffs' bill of complaint, all then being received in evidence (313-329, 354-355).

Opening statement was then made by attorney Harry J. Lippman in behalf of the plaintiffs (329-339).

Opening statement was then made by Mr. Bilitzke in behalf of the Receiver (339-343).

Attorney Harry J. Lippman then called J. O. Mutch, former cashier of said bank, as a witness for cross examination under the statute (344-504). In his cross examination of J. O. Mutch, he covered the various matters and accounts referred to in plaintiffs' bill of complaint (344-504). The trial commenced June 14, 1939, and ran all that day. Was resumed on June 15, 1939 (414), and ran all that day, until the morning of June 16, 1939 (503). At that time Mr. Lippman reported to the court that Harvey A. Chamberlain had just passed away and that it was necessary that the trial be suspended awaiting the appointment of a legal representative of his estate and the revival of said cause with reference to such representative. At that point the taking of testimony was suspended by the Court (504).

On July 28, 1939 suggestion of death of Harvey A. Chamberlain was filed by attorney Harry J. Lippman in behalf of plaintiffs' Tudrycks (92) and on the same date Order of Revival signed by John C. Shaffer, Circuit Judge, was filed, in accordance with Michigan practice (91).

The cause was revived in the name of Katherine M. Redmond, Administratrix of the Estate of Harvey A. Chamberlain, deceased (92). Copy of the Bill of Complaint and Order of Revival was served upon Katherine M. Redmond, Administratrix as aforesaid (93). Thereafter the default of Katherine M. Redmond was regularly entered by attorney Harry J. Lippman who filed affidavit of regularity (96), affidavit of default (95), and order pro confesso as to said Katherine M. Redmond, Administratrix as aforesaid (94), in accordance with Michigan practice.

Tony Tudryck and Andrew Smyl were both present at the time of trial in Circuit Court and assisted attorney Harry J. Lippman in the presentation of the testimony. Attorney Harry J. Lippman continued the accounting after the taking of testimony had been suspended and as a result thereof found that plaintiffs Tudrycks were heavily indebted to said bank and to said Receiver. At that point attorney Harry J. Lippman negotiated with the attorneys for said Receiver for a compromise and settlement of the matters, all of which appears in the

affidavit of Harry J. Lippman filed in opposition to Tudrycks' motion to vacate said decree, as follows:

> "Deponent, (Harry J. Lippman) further shows that the trial of the within cause took place during period June 14th to 16th, 1939 inclusive, both the said Tony Tudryck and the said Andrew Smyl, being, on that occasion, in court, and both of them assisting this deponent in his examination of defendant, J. O. Mutch, when making inquiry in reference to the sale of interest in the premises by the said Smyls to the said Tudrycks, neither of them, at that time, representing that the said Smyls then had any interest whatsoever in said premises.
>
> "Deponent, (Harry J. Lippman) further shows that following the conclusion of proofs had in this cause upon the 16th day of June, 1939, an accounting was had by the parties hereto, necessitating considerable time and effort, and all as a result of which same, the said plaintiffs were found to be heavily indebted unto the cross-plaintiff, bank receiver, and all because of which same negotiations with the attorneys representing such receiver, for purpose of compromise and settlement, were then begun, all with the knowledge and consent of said Tudryck, and all as a result whereof the said Tudrycks did finally agree to convey all their interest in the premises in this cause involved to the bank receiver, upon the receipt by them, to be distributed between them and their counsel, of the sum of Three Hundred ($300.00) Dollars, and a cancellation of all their liability unto the said bank and the bank receiver under mortgages, notes, etc., and which said settlement was subsequently, upon stipulation of this deponent so then executed with the knowledge and consent of the said Tudrycks, carried into effect, a Decree, in consequence thereof having herein been entered on or about the 25th of January, A. D., 1940" (158-159).

On November 6, 1939 plaintiffs Tudrycks by letter authorized attorney Harry J. Lippman to make settlement of all claims involved in said cause, they to receive $400.00

and a complete discharge of all obligations due said bank (161). In reply to that offer the Receiver offered to pay $300.00 and to give a complete discharge of all obligations due said Receiver. This was accepted. Stipulation was then prepared and signed by Harry J. Lippman in behalf of plaintiffs, Tudrycks, and Yeo and Bilitzke, in behalf of H. L. Switzer, Receiver, and submitted to Hon. John C. Shaffer, Circuit Judge, incorporating the terms of settlement (97-99). Said stipulation provided for the following:

1. Payment by Switzer, Receiver, to plaintiffs Tudryck of $300.00 and a conveyance from plaintiffs Tudryck to said Switzer, Receiver, conveying all of their interest in said real estate and premises including equity of redemption of mortgages and land contract referred to in the bill of complaint, payment to be made upon entry of decree in said cause. That in default of the execution and delivery of deed that said decree have the same effect as a conveyance to said Switzer, Receiver (98).

2. Said decree to provide that upon payment of $300.00 and the cancellation of said indebtedness, Switzer, Receiver, would become the owner in fee simple of said premises.

3. That defendants Smyl and all other parties to said cause, have no right, title or interest whatsoever in said lands and premises (98).

4. Said decree to be a final decree in said cause entered pursuant to the testimony and agreement of said parties as evidenced by said stipulation (99).

Switzer, Receiver, then filed petition asking for authority to make settlement as evidenced by said stipulation attaching thereto copy of the stipulation (515-518).

On January 25, 1940, at a session of said court, held before the Hon. John C. Shaffer, Circuit Judge, (local Circuit Judge who had charge of the Receivership proceeding and also the trial judge in the said Tudryck suit), said petition and stipulation was presented in open court and thereupon the court entered an order dated January 25,

1940, authorizing the Receiver, Switzer, to make settlement of said cause in accordance with provisions of said stipulation (519-520).

Decree was then prepared and before the same was submitted to Judge Shaffer for signature, it was approved by attorney H. J. Lippman in behalf of plaintiffs Tudryck (104) and by Yeo and Bilitzke in behalf of said Switzer, Receiver. Decree was entered by Judge John C. Shaffer, on January 25, 1940 (100-104). Decree was filed on January 27, 1940 and after the same was entered by the Clerk, notice of such entry together with a true copy of the decree, was served upon Harry J. Lippman, attorney for plaintiffs Tudryck (104-105).

Attorney Harry J. Lippman then delivered to attorneys for said Receiver the following papers executed by Tudrycks, namely:

1. Quit claim deed dated November 6, 1939 from Tony Tudryck and Mary Tudryck, his wife, grantors, to H. L. Switzer, permanent Receiver of Sterling Bank of Sleeper and Chamberlain, grantee, covering all of said premises, which deed was recorded June 20, 1944 in the Register of Deeds Office of Arenac County, Michigan (522-523).

2. Assignment of all right, title and interest in and to any and all existing lease or leases covering oil and/or gas and/or minerals and/or products of any kind (525).

On January 25, 1940 check of H. L. Switzer, Receiver for $300.00 was drawn made payable to Mary and Tony Tudryck (527).

It was mailed to attorney Harry J. Lippman who signed receipt which is filed in this cause (106), which recites the following:

"• • • Said check is issued in full payment of the sum decreed to be paid to said plaintiffs in settlement of said cause as more fully appears from stipulation and decree on file in said cause. Dated January 30, 1940." Signed, "Harry J. Lippman, Attor-

ney for Plaintiffs. Business Address: 910 Majestic Building, Detroit, Michigan" (106).

Upon receipt of the check for $300.00 from Switzer, Receiver, attorney Harry J. Lippman made settlement with Tudrycks, his clients, by deducting the amount payable to him as attorney for fees and expenses and drawing his check payable to Tudrycks for $110.00. The check dated January 30, 1940, prepared by attorney Harry J. Lippman, carries the following recital over the signatures of Tony Tudryck and Mary Tudryck on the reverse side thereof, namely:

> "in full compromise, satisfaction and discharge of cause entitled Tony Tudryck et al vs. J. O. Mutch et al" (163).

On the same day attorney Harry J. Lippman took from Mary Tudryck and Tony Tudryck their receipt as follows:

> "Received of Harry J. Lippman the sum of Three Hundred ($300.00) Dollars, being all the moneys by the said Lippman received in full compromise, satisfaction and adjustment of our claim against J. O. Mutch, et al, as involved in cause entitled Tony Tudryck et al plaintiffs, vs. J. O. Mutch et al, defendants, now and heretofore pending in the Circuit Court for the County of Arenac, Chancery Division, Michigan." Signed, "Mary Tudryck, Tony Tudryck" (163-164).

H. L. Switzer continued as receiver of said bank until September 15, 1942 at which time order was entered accepting his resignation and appointing Joseph Martin, successor receiver (508-511). Joseph Martin qualified as successor receiver by filing his bond on September 21, 1942 (512-514). The said Joseph Martin had previously acted as temporary receiver. Upon the entry of the decree and receipt of deed and other papers from plaintiffs Tudrycks, the Receiver immediately took possession of said real estate and premises and thereafter exercised sole control and supervision of same. It was thereafter leased for oil and gas by said Receiver and said Receiver paid all taxes

levied and assessed upon said premises. The first oil well drilled upon said premises was abandoned as a non-productive commercial oil well. In the year 1944 a second well was drilled upon said premises with the result that oil and gas is being produced from said premises in commercial quantities (133).

After Tudrycks made settlement with said Receiver, attorney Harry J. Lippman filed for them a separate action for damages on the law side in said Arenac Circuit Court, against J. O. Mutch, individually, same being cause No. 874, entitled Tony Tudryck, Plaintiff, vs. J. Otis Mutch, Defendant. The following are the calendar entries in that case:

1940

Apr. 3, Declaration with rule to plead, bill of particulars; and demand for jury, filed.
3, Proof of service of declaration filed.
May 2, Default of defendant, J. Otis Mutch, filed.
Sept. 11, Heard — default judgment and costs granted.
11, Judgment entered — $4500; costs taxed at $59.20.

1941

Feb. 7, Praecipe for execution filed — execution issued.

1942

Apr. 29, Execution returned and filed (174).

Attached to the declaration is an assignment from Mary Tudryck to Tony Tudryck, which reads in part as follows:

"• • • do by these presents sell, assign, transfer and set over unto the said Tony Tudryck, all my right, title and interest in and to the farm premises and any and all buildings thereon *which my said husband and myself did own prior to January 25th, A. D. 1940.* • • •" (179).

Tony Tudryck took judgment against J. O. Mutch by default in the sum of $4500.00. In taking that default judgment against J. Otis Mutch, attorney Harry J. Lippman called as witnesses Tony Tudryck and Andrew Smyl. (Testimony of Tudryck and Smyl shown at pages 281-300 of Record). Tony Tudryck undertook to enforce said judgment by garnishment. Defendant Mutch claimed discharge by reason of bankruptcy. The trial judge, Hon. John C. Shaffer, found that the judgment against J. Otis Mutch was not released by the discharge in bankruptcy. On appeal to the Michigan Supreme Court, by J. Otis Mutch, that finding of the lower court was affirmed. See Tudryck vs. Mutch, 320 Mich. 86. The Clerk of the Court reports that said judgment has since been paid out of the cash bond that was filed by J. Otis Mutch, referred to in 320 Michigan, page 86, so that Tudrycks and Harry J. Lippman, their attorney, have had the benefit of such judgment. The Clerk paid Tudrycks $5500.00 on February 16, 1948. The Receiver was not a party to that suit for damages.

Plaintiffs Tudryck made no claim in opposition to said settlement with said receiver until October 31, 1944, when they filed their Motion to Vacate said Decree and to Grant a Rehearing (125) by James F. Murray attorney. No constitutional question was raised by said motion (125). The basis of said motion, as shown by the accompanying affidavit of Tony Tudryck and Mary Tudryck, was that their attorney, Harry J. Lippman, had settled the case without their authority and without their knowledge and consent (127). Oil had been discovered upon said property earlier in the year 1944 (134). Defendants Smyls had previously filed a Motion to Vacate said Decree on August 16, 1944 (107).

Upon the filing of Tudrycks' motion to Vacate Decree and Grant a Rehearing, Joseph Martin, Receiver, filed a Motion to Dismiss the said Tudryck Motion (137-146). Said motions came on for hearing before the Hon. John C. Shaffer, Circuit Judge, on December 12, 1944 (169). In addition to the several exhibits offered and received in evidence on the part of said Receiver, attorney Harry J. Lippman submitted in open court and filed with the clerk

of said court the following affidavits in opposition to the motions made by Tudrycks and Smyls, namely:

1. Affidavit of Celia Drapkowski (150).
2. Affidavit of Harry J. Lippman (157).
3. Affidavit of Thomas Olszynski (168).

Copies of same were served upon attorney J. P. Mikesell who appeared for both Tudrycks and Smyls upon the presentation of these motions (170). No affidavits were filed by either Tony or Mary Tudryck or Andrew Smyl and Victoria Smyl in opposition to the affidavits submitted by attorney Harry J. Lippman.

Thereafter briefs were filed by all parties and on June 30, 1945, Judge Shaffer filed his written opinion denying the motion of said Tudrycks as well as the motion made by Smyls (207-213), and granting the Motions to Dismiss said Motions filed by Joseph Martin, Receiver. On April 17, 1946, attorney James F. Murray, acting for plaintiffs Tudryck, gave notice of a hearing to settle, for the purpose of having entered, order of the court following said written opinion (213). Upon that hearing formal order was signed by the Hon. John C. Shaffer dated April 23, 1946, denying the plaintiffs Tudrycks' motion to set aside the decree (219-221). At the same time order of Substitution and Intervention of H. L. Switzer, successor Receiver was entered nunc pro tunc as of December 16, 1938 the date on which H. L. Switzer qualified as Receiver to succeed Joseph Martin, temporary Receiver (221-223).

A motion to Strike and Vacate the Order of Substitution and Intervention of H. L. Switzer, Receiver, was thereafter filed in May, 1946, by attorney Harry J. Lippman acting for Tudrycks (225). Said matter came on for hearing in open court before the Hon. John C. Shaffer on May 21, 1946 (188). At that time there was pending in said court chancery case No. 1015, entitled:

"Harry J. Lippman and Marian F. Lippman, his wife, as tenants by the entireties and Marian F. Lippman, in her individual capacity,

Plaintiffs,

vs.

Joseph Martin, Receiver of Sterling Bank of Sleeper and Chamberlain, Don F. Rayburn and Nina Rayburn, his wife, J. Otis Mutch and Mary Mutch, his wife, Lawrence V. Denny and Anola Denny, his wife, Anthony Tudryck and Mary Tudryck, his wife, Andrew Smyl, also known as Andrew Smaiel and Victoria Smyl, also known as Victoria Smaiel, his wife, Basin Oil Company, a Michigan corporation, Don F. Rayburn doing business as Rayburn Pipe Line Company and Thomas Olszynski,

Defendants" (188).

At the hearing on May 21, 1946, attorney Harry J. Lippman tendered back to the Receiver $300.00 being the sum paid by the Receiver at the time of settlement, which tender was refused and objection made that the same was not made at the time said Motions to Vacate were heard nor prior to the entry of the order denying said Motions to Vacate (190).

On July 1, 1946 the Hon. John C. Shaffer, Circuit Judge, entered an order denying the Motion by Harry J. Lippman to Strike and Vacate the Order of Substitution and Intervention (250).

Neither Tudrycks nor Smyls filed a motion for rehearing in the Supreme Court of the State of Michigan following the decision handed down January 6, 1948.

ARGUMENT

A.

That the Judgment and Decision of the Michigan Supreme Court was based upon Non-federal Grounds.

The unanimous decision of the Michigan Supreme Court reviewed every material question presented by petitioners Tudryck as well as Smyls. The facts as set forth in the Michigan decision are accurate and taken from the record. Summarizing briefly from that decision, the state court held:

(a) Tudrycks invoked the jurisdiction of the trial court by filing an action *for an accounting* against said bank (276 Supplement).

> The Court: "* * * The ultimate object of the *accounting* suit was to secure a determination that plaintiffs were the fee owners of the property involved, and that it was free and clear of all liens and encumbrances" (276 Supplement).

(b) That Smyls as well as the other defendants, were *personally served with process* of the trial court. The default of Smyls was entered after personal service (277). After testimony had been taken, plaintiffs Tudryck proposed settlement with said receiver which was approved by the court and consummated.

> The Court: "A decree in proper form and ample in substance was filed in the cause, contemporaneously with the stipulation * * *" (278 Supplement).

(c) The decree affecting the interest of said Tudrycks was in essence and effect a consent decree (278).

> The Court: " 'A judgment by consent cannot ordinarily be set aside or vacated by the court without the consent of the parties thereto * * * for the reason it is not the judgment of the court but the judgment of the parties'. In re Estate of Meredith, 275 Mich. 278, 289" (278 Supplement).

(d) That attorney Harry J. Lippman was authorized by Tudrycks to enter into the stipulation and to make such settlement.

> The Court: "* * * He (Tudryck) and his wife executed and acknowledged a quit-claim deed in consummation thereof. The Tudrycks were present in court during the taking of testimony and at the conference which led to the settlement agreement. * * *" (279 Supplement).

(e) That after making the settlement, Tudrycks recognized that their ownership in said property terminated on January 25, 1940, as shown by assignment from Mary Tudryck to Tony Tudryck made in conjunction with suit for damages against J. Otis Mutch (279).

(f) That by failing to appear and deny the allegations of the original bill, the Smyls admitted all the well pleaded averments thereof.

> The Court: "* * * One of these admissions was that they had no further interest in the subject matter of the litigation and that the accounting between the Tudrycks and the bank and others was none of their concern" (279-280 Supplement).

(g) That the decree was within the scope of the bill of complaint.

> The Court: "* * * We find nothing in the decree outside the scope of the bill of complaint; * * *" (280).

(h) That under the Michigan practice where suit is filed for an accounting it is not necessary to file a cross-bill to obtain affirmative relief (280 Supplement).

(i) That the doctrine of laches and provisions of Michigan Court Rules 28 (time for setting aside defaults) and 48 (limiting time for rehearings) apply (280 Supplement).

(j) That the nunc pro tunc order entered by the court was authorized by the state statute (280 Supplement), and prior state decisions.

(k) That the law of Michigan to the effect that in any action or proceeding the court shall disregard any error or defect in the proceeding, which does not affect the substantial rights of the parties was applicable. (Law of Michigan since 1897). See Sec. 14144 Compiled Laws of Michigan, 1929 (Sec. 27.838 Michigan Statutes Annotated) and numerous decisions cited therein (280 Supplement).

(l) That the argument advanced to the effect that Switzer, Receiver, was a stranger to said proceeding, and that the decree exceeded the judicial power of the court in granting relief to such receiver, was based upon a false premise.

> The Court: "Both appellants have suggested that State and Federal constitutional questions are involved, arguing that the decree exceeds the judicial power of the court in purporting to give relief to a permanent receiver who was a stranger to the proceedings. The conclusion as thus stated is based upon a false premise. Both receivers, predecessor and successor, were officers of the court in which the cause was pending; and we have never understood that the authority of a successor receiver, as an officer of the court, can thus be challenged. We find no constitutional questions involved" (281 Supplement).

Federal Question Must Appear Affirmatively from the Record:

In *Lynch vs. New York Ex Rel Pierson,* 79 Law. Ed. 191, 293 U. S. 52, (1934) this court, speaking through Chief Justice Hughes, said:

(Syllabus):

> "3. It is essential to the jurisdiction of the Supreme Court of the United States in reviewing a state court decision that the record affirmatively show not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as

rendered could not have been given without deciding it."

In *Herb vs. Pitcairn,* 89 Law. Ed. 794, 324 U. S. 124 (1944), this court speaking through Mr. Justice Jackson, considering writ of certiorari to the Supreme Court of the State of Illinois, said:

(Opinion):

"Third. This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. Murdock v. Memphis, 20 Wall. (US) 590, 636, 22 L ed 429, 444; Berea College v. Kentucky, 211 US 45, 53, 53 L. ed 81, 85, 29 S Ct 33; Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 US 157, 164, 61 L ed 644, 648, 37 S Ct 318; Fox Film Corp. v. Muller, 296 US 207, 80 L ed 158, 56 S Ct 183. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. * * *"

No Constitutional Questions Involved:

We refer briefly to the laws of Michigan and the established rules of practice therein which clearly shows that no constitutional questions were involved in this cause.

1. Tudrycks had instituted the suit and thereby invoked the jurisdiction of the court of general jurisdiction in the State of Michigan.

Michigan Rule:

Parties who invoke equity jurisdiction cannot thereafter question the jurisdiction of the court.

Western & Southern Life Ins. Co. vs. Brana, 275 Mich. 19;
Livingston vs. Livingston, 276 Mich. 399;
Bracklow vs. Bracklow, 310 Mich. 201;
Sawyer vs. McAdie, 70 Mich. 388.

2. The trial court had jurisdiction of the subject matter, namely: suit for accounting, removal of clouds to title of real estate, discharge of mortgages and for injunctive relief.

Michigan Rule:

"A bill may be filed in equity for an accounting, as a general rule, where fraud is charged or fiduciary relations exist; and an accounting may be prayed for in a bill to establish or dissolve a partnership; and also in other cases where the contracts or transactions involved are intricate and the machinery of the law, for that reason inadequate."

Searl Michigan Practice, (1934) Section 1313.

"Equity has jurisdiction, independent of statute, to set aside deeds and other legal instruments which are clouds upon title to real estate."

Searl Michigan Practice, (1934) Sec. 1266.

"A bill in equity may be filed to redeem from a mortgage foreclosure or to have a mortgage declared paid and satisfied;"

Searl Michigan Practice, (1934) Section 1315.

"Equity alone can grant injunctive relief."

Searl Michigan Practice, (1934) Sec. 1151.

3. Circuit Court summons, together with copy of the bill of complaint and injunction, was personally served upon all of the defendants (32-44).

Michigan Rule:

On page 32 of the Record is the form of summons prescribed by Rule 14 of Michigan Court Rules. The defendants are notified to appear within 15 days after service of said summons. It concludes: "Hereof fail not, under penalty of having said bill taken as confessed against you" (32).

4. The Receiver of said bank was made a party to said cause by order of intervention signed by the Circuit Judge (88).

5. Smyls having failed to appear, their default was regularly entered as authorized by Rule 28 of Michigan Court Rules (82-84).

6. The case came on for trial in open court at Standish, Michigan, on June 14, 1939, at which time attorney Harry J. Lippman for Tudrycks, proceeded by presenting the testimony of Mrs. Avis Black, Register of Deeds of Arenac County, Michigan, and the lengthy cross examination of J. Otis Mutch as to accounting matters. Testimony appears at pages 313-504 of the Record.

7. Tony Tudryck and Andrew Smyl were both present in court at the time of the trial as shown by the affidavit of their attorney, Harry J. Lippman (158-159), and the testimony of Andrew Smyl in the subsequent suit brought by Tony Tudryck against J. O. Mutch (298).

8. Settlement agreement having been reached between Tudrycks and said Receiver, stipulation was signed and filed providing that the decree should be "entered pursuant to the testimony in said cause and agreement of said parties as evidenced by this stipulation" (Paragraph 4, R. 99).

9. The Circuit Judge of Arenac County, Michigan, was a necessary party to that settlement agreement for the reason that the assets of said bank were then in *custodia legis,* through his receiver.

10. In completing settlement, the receiver took from Tony Tudryck and Mary Tudryck, his wife, their quit claim deed (522), and assignment of interest in oil and gas leases (525).

11. Michigan law has sanctioned consent decrees for many years.

The court has said it is a contract that carries with it the sanction of the court. In the instant case the court was a necessary party to the contract for the reason that the property was in *custodia legis* under the charge of the

same trial judge. In the following cases the Michigan Supreme Court approved consent decrees:

Fortunato vs. DiFlippo, 256 Mich. 545;
Hodges vs. McDuff, 76 Mich. 303;
Horning vs. Saginaw Circuit Judge, 161 Mich. 413;
Leo vs. Meyerhoven, 247 Mich. 490;
Russell vs. White, 63 Mich. 409;
Wyatt vs. Sweet, 48 Mich. 540;
Lowe vs. Schuyler, 187 Mich. 526;
Kelly vs. Heinzelman, 311 Mich. 474.

This Court has refused Appeal from Final Decree based upon Compromise Agreement.

In dismissing writ of certiorari, this court in *Furness, Withy & Co. vs. Yanz-Tske Ins. Asso.*, said:

(Opinion):

"We were not advised by petition of June 15, 1915, or memorandum opposing it, that the final decree in the limitation proceedings was based upon an express compromise agreement; otherwise the writ would not have been allowed."

242 *U. S.* 433, 61 *Law. Ed.* 415.

There was Due Process of Law:

Section 16, Article II of the *Michigan Constitution* provides:

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, *without due process of law.*"

In defining the requirements of due process of law, the Supreme Court of the State of Michigan has said:

(Syllabus):

"c — The due process of law required by the Constitution means that notice or summons by which a par-

ty is tendered his day in court, with a right to frame an issue and be heard before a judgment can be rendered or execution issued which shall take away his liberty or property."

Rouse, Hazard & Co. vs. Circuit Judge, 104 Mich. 235.

The following decision of this court is applicable:

(Syllabus):

"2. There is no color for a contention that a man is deprived of property without due process of law by enforcing against him a decree for alimony rendered in another state in a proceeding in which he appeared and was heard."

Lynde vs. Lynde, 181 U. S. 183, 45 Law. Ed. 810

It is our understanding that the provisions of the 14th Amendment to the constitution of the United States which is a limitation upon the right of the several states, has no application to the issue sought to be urged by petitioners Tudryck. That said 14th Amendment has reference to *state action exclusively* and not to any action of private individuals (*Corrigan vs. Buckley,* 70 L. ed. 972, 271 U. S. 322). In cases where due process of law under the 14th Amendment to the constitution was before this court for consideration, the same rule has been announced, namely:

"* * * It is scarcely necessary to say that this court, when asked to revise proceedings in state courts, have always held that due process of law is afforded litigant if they have an opportunity to be heard at any time before final judgment is entered. Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763. 8 Sup. Ct. Rep. 921; Gallup v. Schmidt, 183 U. S. 307, ante, 213, 22 Sup. Ct. Rep. 164; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925."

Wilson vs. Standefer, 184 U. S. 415, 46 Law. ed. 619.

"• • • Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. Art. VI. Const. Here the State Court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States."

Walker vs. Sauvinet, 92 U. S. 90, 23 L. ed. 678.

(Syllabus):

"A State cannot be deemed guilty of violating the constitutional provision against depriving a person of life, liberty or property 'without due process of law,' because one of its courts, while acting within its jurisdiction, has made an erroneous decision; as in ordering a guardian's sale without first requiring a bond to be filed and approved as a statute of the State required."

(Opinion):

"• • • The constitutional provision is 'Nor shall any State deprive any person of life, liberty, or property without due process of law.' Certainly a State cannot be deemed guilty of a violation of this constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. The Legislature of a State performs its whole duty under the Constitution in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the courts, and the parties are left to the appropriate remedies for the correction of errors in judicial proceedings."

Arrowsmith vs. Harmoning, 118 U. S. 194, 30 Law. ed. 243.

The Decree was Responsive to the Issues Tendered by the Pleadings.

In considering that question urged in this case, the Supreme Court of the State of Michigan, said:

> **"We find nothing in the decree *outside the scope* of the bill of complaint" (280 Supplement).**

Where the Supreme Court of the United States has had occasion to consider the validity of final judgments under the full faith and credit clause of the Federal constitution, it said:

> **" 'The inquiry is, Had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. * * *"**
>
> ***Reynolds vs. Stockton*, 140 U. S. 268, 35 Law. ed. 469.**

(Opinion):

> **"But 'a court of equity ought to do justice completely, and not by halves;' and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. Camp v. Boyd, 229 U. S. 530, 551, 552, 57 L. ed. 1317, 1326, 1327, 33 Sup. Ct. Rep. 785, and cases cited. After the making of the consent decree and the deposit of the money in court, the situation of this case was substantially that of an interpleader suit after the**

making of a decree for the interpleader and the dismissal of the stakeholder from the cause, with the issue as between the conflicting claimants limited by stipulation to the determination of the amount 'justly due' from the one to the other. That question of course, was and is to be decided according to the equities of the claimants as between themselves, without regard to legal technicalities. Whitney v. Cowan, 55 Miss. 626, 645, 647.

"We also think the ascertainment whether anything, and if so how much, was due to complainants, was well *within the prayer for general relief*, and cannot agree with the court of appeals that there was any necessity for amending the bill. Nor could the executrix, by her answer, raise any issue other than the simple one previously reserved by the consent decree."

McGowan vs. Parish, 237 U. S. 296, 59 Law. Ed. 963.

B.

The Michigan Supreme Court Found no State or Federal Constitutional Questions Involved in the case.

In the forepart of this brief, on page 21, we have summarized the decision of the Supreme Court of the State of Michigan, noting its analysis of the various questions presented by Tudrycks and Smyls, the court concluding:

"Both appellants have suggested that State and Federal constitutional questions are involved, arguing that the decree exceeds the judicial power of the court in purporting to give relief to a permanent receiver who was a stranger to the proceedings. The conclusion as thus stated is based upon a false premise. Both receivers, predecessor and successor, were officers of the court in which the cause was pending; and we have never understood that the authority of a successor receiver, as an officer of the court, can thus be challenged. We find no constitutional questions involved" (281 Supplement).

The Michigan court followed the general rule with reference to property in possession of a receiver, namely:

> "(Sec. 118) As a general rule it may be stated that property in the possession of a receiver is in *custodia legis;* that the receiver's possession is the possession of the court for the benefit of the party or parties ultimately entitled, nor is such legal custody altered by the removal of the receiver and the appointment of another in his place." 53 *Corpus Juris,* p. 95-96.
>
> "The Court will take *judicial notice of its own officers,* but not of those of another court. Norvell vs. McHenry, 1 Mich. 227 (1849)."

Tudrycks' motion to vacate the decree filed in the trial court and their affidavit attached thereto, raised no constitutional questions (125-127).

Tudrycks having invoked the jurisdiction of the trial court and all parties in interest in the subject matter being before the court of general jurisdiction in the State of Michigan by reason of personal service of process of the court, and Tudryck and Smyl having participated in the presentation of the testimony in the case, (defendants Mutch and Chamberlain having stated to the court that they had no interest in the subject matter of said suit (312)) and the default of Smyls for want of appearance or answer to the bill of complaint, having been regularly entered, the subject matter of said suit being in *custodia legis* under the supervision of the same chancellor, and Tudrycks having received report from their attorney Harry J. Lippman of his accounting (159) showing that they were *heavily indebted* to said receiver in connection with the purchase of said property, and thereafter having made settlement agreement which was confirmed by the court having charge of said receivership property, afforded Tudrycks every constitutional safe-guard. *There is no color of merit* in Tudrycks' claim that this case presents any constitutional questions.

The following opinion of this court is applicable:
(Opinion):

"The action was regularly proceeded with, and was determined against plaintiff in error on grounds which did not involve Federal questions, and therefore it is not within our power to review the judgment of the supreme court of the state.

"The plaintiff in error thus sought in the state court and was given opportunity to litigate the rights claimed by it and it cannot complain that the guaranties of the Constitution of the United States were denied because the litigation did not result successfully. Central Land Co. v. Laidley, 159 U. S. 112 (40:95); Walker v. Sauvinet, 92 U. S. 80 (23: 678); Head v. Amoskeag Mfg. Co., 113 U. S. 9, 26 (28: 889, 895); Morley v. Lake Shore & M. S. Railroad Co., 146 U. S. 162, 171 (36:925, 930); Bergemann v. Backer, 157 U. S. 655 (39:845).

"It follows that this writ of error cannot be maintained.

"The rule was announced in Eustis v. Bolles, 150 U. S. 370 (37:1113), 'that when we find it unnecessary to decide any Federal question, and when the state court has based its decision on a local or state question, our logical course is to dismiss the writ of error.' See also St. Louis, C. G. & Fort Smith R. Co. v. Missouri (Merriam), 156 U. S. 478 (39: 502); Hamblin v. Western Land Co., 147 U. S. 531 (37: 267); Castillo v. McConnico, 168 U. S. 674 (42:622).

"Writ of error dismissed."

Remington Paper Co. vs. Watson, 173 U. S. 451, 43 Law. ed. 765.

C.

This Court has no jurisdiction based upon Acts of Congress for the reason that this suit does not infringe upon any title, right, privilege or immunity specially set up or claimed by petitioners under the constitution * * * or statute of * * * the United States. The 14th Amendment to the Federal Constitution has reference to State Action Exclusively, and is not applicable in the instant case which involves only claims of private individuals.

Tudrycks make no claim that this case involves either the validity or construction of any statute of the United States.

There is no claim involving the constitutionality of any state law applied and considered by the Supreme Court of the State of Michigan.

The only question presented by the petition is that the decision of the state court deprives petitioners of *due process of law* and *equal protection of the laws* as guaranteed by the 14th Amendment to the Federal constitution. (Page 10 of Petition).

Tudrycks' motion to vacate the decree filed in the trial court and their affidavit attached thereto raises no constitutional questions (125-127). The only constitutional question raised in the Supreme Court of the State of Michigan, as shown by Statement of Reasons and Grounds of Appeal (261-262) was that they had been denied *due process of law.*

We have shown that the decision of the Supreme Court of the State of Michigan rested entirely on non-federal grounds, the court having found no constitutional questions involved, and having based its decision on state laws, state rules of practice and prior Michigan decisions.

The 14th Amendment to the Federal Constitution not applicable to this case.

This being an *action between private individuals,* it is our understanding that the provisions of the 14th Amendment to the Federal constitution are not applicable. This court has said:

(Syllabus):

"2. The prohibitions of the 14th Amendment have reference to state action exclusively, and not to any action of private individuals. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws and, consequently, the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against state infringement of those rights. Section 641 was also intended for their protection against state action, and against that alone."

Ex Parte, Commonwealth of Virginia, 100 U. S. 313, 25 Law. ed. 667.

(Opinion):

"* * * And the prohibitions of the 14th Amendment 'have reference to state action exclusively, and not to any action of private individuals.' Virginia v. Rives, 100 U. S. 313, 318, 25 L. ed. 667, 669; United States vs. Harris, 106 U. S. 629, 639, 27 L. ed. 290, 294, 1 Sup. Ct. Rep. 6-1. 'It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.' Civil Rights Cases, 109 U. S. 3, 11, 27 L. ed. 836, 839, 3 Sup. Ct. Rep. 18. It is obvious that none of these Amendments prohibited private individuals from *entering into contracts respecting the control and disposition of their own property;* and there is no color whatever for the contention that they rendered the indenture void. * * *"

Corrigan vs. Buckley, 271 U. S. 330, 70 L. ed. 973.

(Opinion):

"There is only one other clause in the Constitution of the United States which can, in any degree, be supposed to sustain the section under consideration, namely: the 2d section of article 4, which declares that 'The citizens of each State shall be entitled to all the

privileges and immunities of citizens of the several States.' But this section, like the 14th Amendment, is directed against state action. Its object is to place the citizens of each State upon the same footing with citizens of other States, and inhibit discriminative legislation against them by other States. Paul v. Virginia, 8 Wall. 168 (75 U. S. XIX 357).

"Referring to the same provision of the Constitution, this court said, in the Slaughter-House Cases, ubi supra, that it 'Did not create those rights which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the state governments over its own citizens. Its sole purpose was to declare to the several States that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.'"

United States vs. Harris, 106 U. S. 643, 27 Law. Ed. 295.

(Syllabus):

"2. The contention in an independent suit to quiet title that to sustain the validity of a prior judicial sale of the real property of a decedent in order to pay his debts, would deny the due process of the law guaranteed by U. S. Const. 14th Amend., because the state statutory requirement as to time for hearing when service was had by publication was not observed, does not draw in question the validity of an authority exercised under a state, within the meaning of the Judicial Code, Sec. 237, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. 1916, Sec. 1207), governing writs of error from the Federal Supreme Court to state courts."

Stadelman vs. Miner, 246 U. S. 544, 62 L. ed. 875.

(Corpus Juris):

"b. Fourteenth Amendment. The fourteenth amendment provides: 'Nor shall any State deprive any person of life, liberty, or property, without due process of law.' As clearly indicated by the language used, this amendment constitutes a limitation on the powers of the states. It adds nothing to the rights of one citizen against another, but simply furnishes a guaranty against any encroachment by the state on the fundamental rights which belong to every citizen."

12 *Corpus Juris,* (Constitutional Law), Sec. 959.

D.

That the findings of the State Court on Question of Jurisdiction, Pleadings, Practice and Procedure, Doctrine of Laches, Limitation In Re Re-hearing, Construction, Application and Effect of State Constitutional Provisions and Laws are all binding upon this Court and are not proper questions for review.

We list below a few of the decisions of this court in support of our contention that this court will not review the findings of the state court on the different issues involving local state law, including jurisdiction of the court, etc., namely:

(a) *Jurisdiction of state court.*

(Syllabus):

"1. A determination by the state's highest court, of the jurisdiction of a state court, is binding on the Supreme Court of the United States."

Kersh Lake Drainage District vs. Johnson (1940), 84 L. Ed. 881, 309 U. S. 485.

Pacific Gas & Electric Co. vs. Police Court of City of Sacramento, 251 U. S. 22, 64 L. Ed. 112, 40 Sup. Ct. 79;

French vs. Hopkins, 124 U. S. 524, 31 L. Ed. 536, 8 Sup. Ct. 589.

(b) *State pleadings.*

(Syllabus):

"4. Whether the pleadings in the cause justified a grant of affirmative relief, considered as a mere question of practice, presents no Federal question."

National Foundry & Pipe Works vs. Oconto City W. Supply Co., 183 U. S. 216, 46 Law. Ed. 158.

Lee vs. Central of Georgia Ry. Co., 252 U. S. 109, 64 L. Ed. 482, 40 Sup. Ct. 254;
Brinkmeier vs. Missouri Pac. R. Co., 224 U. S. 268, 56 L. Ed. 758, 32 Sup. Ct. 412.

(c) *State practice and procedure.*

(Syllabus):

"1. The Supreme Court, upon certiorari to a state court to review an order granting a motion by a defendant for summary judgment, is not entitled to inquire into the propriety, under the state practice, of basing such a motion upon the record in an earlier case involving the same questions, this being distinctly a question of state law."

United States vs. Pink, 86 L. Ed. 797, 315 U. S. 203.

Lee vs. Central of Georgia Ry. Co., 252 U. S. 109, 64 L. Ed. 482, 40 Sup. Ct. 254;
Goldsmith vs. George G. Prendergast Const. Co., 252 U. S. 12, 64 L. Ed. 427, 40 Sup. Ct. 273.

(d) *Doctrine of laches.*

(Syllabus):

"1. The question whether a state statute impairs the obligation of a contract is a Federal question; but the question whether the defense of estoppel by laches and acquiescence is established is not a Federal question."

"4. Whether or not a person has lost a right under the Federal Constitution by his action or failure to act is not a Federal question which will sustain a writ of error to a state court."

Pierce vs. Somerset Railway, 171 U. S. 641, 43 Law. Ed. 316.

Moran vs. Horsky, 178 U. S. 205, 44 Law. Ed. 1038.

(e) ***Limitation of time for making application for rehearing in state court.***

(Syllabus):

"5. Limitation of actions is governed by the *lex fori,* and is controlled by the legislation of the state in which action is brought as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions."

"6. The time when a cause of action accrues under a state statute is not a Federal question, but is a local question, on which the decisions of state courts cannot be reviewed by the Supreme Court of the United States."

Great Western Telegraph Co. vs. Purdy, 162 U. S. 329, 40 Law. Ed. 987.

(f) ***Construction, Application and Effect of State Constitution and Laws.***

(Syllabus):

"1. A construction of a state constitution by the courts of the state is binding upon the Supreme Court of the United States."

Louisiana vs. Resweber, 91 Law. Ed. 422, 329 U. S. 459 (1947).

Turner vs. Board of Commissioners, 173 U. S. 461, 43 Law. Ed. 768;
Baldwin vs. Kansas, 129 U. S. 52, 32 Law. Ed. 640.

E.

Tudrycks' Petition does not Present for Review a Federal Question of Substance. Questions urged are frivolous, entirely lacking in substance and color of merit.

No Federal Question of Substance:

Declaring the rule that review on writ of certiorari is not a matter of right, but of sound judicial discretion to be granted only where there are special and important reasons therefor, this court indicating the character of the reasons which must appear in the petition and record has declared by rule as follows:

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."
>
> Subdivision a, Paragraph 5 of *Rule 38* Supreme Court of United States.

Questions urged are Frivolous, Entirely Lacking in Substance and Color of Merit:

Andrew Smyl is a brother-in-law of Tony Tudryck (292). The decree of the trial court, together with deed from Tudrycks, had stood unchallenged from January, 1940 (100) to August, 1944, (107) when Smyls by attorney J. P. Mikesell, filed motion in the trial court to vacate the decree. In that motion Smyls denied having been served with summons and alleged that the affidavit of service made by attorney Harry J. Lippman was *"irregular, false and fraudulent"* (Par. 2, R. 108), (See also affidavit of Andrew Smyl attached thereto, R. 110-117).

Two months later on October 31, 1944, Tudrycks by attorney James F. Murray, filed a motion to vacate the same decree (125), alleging in their affidavit that attorney Harry J. Lippman had made settlement of the case *"without any authority from these deponents* (Tudrycks) and without their knowledge and consent" (127).

When the motions came on for hearing in the trial court, attorney James F. Murray was not present, but attorney J. P. Mikesell appeared for both Tudrycks and Smyls (170). Attorney Harry J. Lippman was also present, and stated he had received a letter from Tudrycks advising that he no longer represented them (172).

Having been charged with making a false affidavit of service, attorney Harry J. Lippman, upon the hearing in the trial court, filed the following affidavits in opposition to the motions by Tudrycks and Smyls (185), namely:

1. Affidavits of Harry J. Lippman (157, 164).
2. Affidavit of Celia Drapkowski (150).
3. Affidavit of Thomas Olszynski (168).

Attorney Harry J. Lippman attached to his affidavit written authority from Tudrycks to make the settlement (161), and averred that the Tudrycks never expressed any dissatisfaction with the settlement until after oil was discovered upon the premises in 1944 (160).

With the affidavits of Harry J. Lippman before the court, attorney J. P. Mikesell, counsel for Smyls, and Tudrycks, withdrew his charge that Smyls were never served with process (208) (277 Supplement).

In the Michigan Supreme Court, attorney James F. Murray was attorney of record for Tudrycks. Attorney Harry J. Lippman filed supplemental brief in behalf of Tudrycks. After the Michigan Supreme Court handed down its decision on January 6, 1948, attorney Harry J. Lippman on February 26, 1948, filed in the state Supreme Court substitution of attorneys signed by attorney James F. Murray and attorney J. P. Mikesell, consenting to the substitution of attorney Harry J. Lippman, as attorney of record for Tudrycks (See calendar entries, 279 Supplement).

When we filed Acceptance of Service of the record in this court, we noted therein that the record only contained the calendar entry which referred to said substitution, and that the substitution itself had been omitted from the supplement to the record for this court.

In answer to Smyls' claim by their motion that they had some interest in this property, attorney Harry J. Lippman by his affidavit dated September 11, 1944, disclosed that Smyls had admitted to him at the time they were served with court summons that they had sold their interest in the property to Tudrycks many years prior thereto (165-166). He concludes his affidavit as follows:

> "Deponent (Harry J. Lippman) further shows that in his opinion, the said defendants, Smyl herein, have no right, title or interest in the premises in this cause involved, having parted with their entire interest in same to the plaintiffs herein many years in advance of the institution of the within suit, *and present claims merely being advanced in a vain attempt to acquire some benefit from the oil and gas recently discovered at said lands*" (167).

Conduct of Attorney Harry J. Lippman:

In brief filed by Harry J. Lippman he makes reference several times to the tender back of $300.00 to the Receiver and we wish to note the circumstances under which that tender was made.

In September, 1944, Harry J. Lippman had submitted to the court (185) in opposition to the present motions, his two affidavits (157, 164) and affidavits of Celia J. Drapkowski (150), stenographer in his office, and Thomas Olszynski (168), agent for Tudrycks, and father of Celia J. Drapkowski.

In May, 1946, at the beginning of the trial of the case brought by Harry J. Lippman and Marian F. Lippman, against Joseph Martin, Receiver, and others, before the same trial judge (188), Harry J. Lippman, claiming to represent Tudrycks, undertook the tender of $300.00 back to the Receiver (190). The Tudrycks' and Smyls' motions had then been heard and disposed of by final order entered by the trial judge (219). At that same time in May, 1946, Harry J. Lippman, undertaking to act in behalf of Tudrycks, filed a motion to vacate and strike order of intervention and substitution of permanent receiver (227), which the court had entered on April 23, 1946. James F.

Murray, attorney of record for Tudrycks did not join therein.

To understand the change of position of Harry J. Lippman, we need only remember that he not only appears in this case as attorney for Tudrycks, but now asserts a personal interest in the outcome of these proceedings as shown by the case of Harry J. Lippman and Marian F. Lippman, plaintiffs, vs. Joseph Martin, Receiver, and others, (188), and referred to in the opinion of the Michigan Supreme Court on page 276 of Supplement.

The matters contained in the affidavits of Harry J. Lippman, made under oath, submitted and received as evidence upon the hearing of these motions in 1944, clearly outweigh argument of Harry J. Lippman in his present brief filed in support of petition for writ of certiorari.

We appreciate the rule that this court will not review the merits of a cause tried in a state court. However, the brief of attorney Harry J. Lippman does not recognize that rule, and burdens this court with the same argument as he advanced in the state court. Harry J. Lippman refers to the settlement as an *unconscionable transaction* and argues that the same results in denying petitioners of the equal protection of the law. The *unconscionable matter* contained in this record is the disgusting conduct of attorney Harry J. Lippman who made settlement with the Receiver as an officer of the court, thereafter filing affidavits in opposition to Tudrycks' motion to vacate the decree, and now has the *audacity* to argue that the settlement which he made for his clients violates any constitutional provision.

The following, from the decision of the Supreme Court for the State of Oregon, applies here:

> "• • • But we prefer to put our decision on the broad principle that: '*A party cannot invoke the jurisdiction* and power of a court for the purpose of securing important rights from his adversary through its judgment *and, after having obtained the relief desired, repudiate* the action of the court on the ground that it was without jurisdiction. The question whether the

court had jurisdiction either of the subject matter of the action or of the parties, is not important in such cases. Parties are barred from such conduct not because the judgment is conclusive as an adjudication, but for the reason that *such a practice cannot be tolerated.' Bledsoe v. Seamann,* 77 Kan. 679, 95 P. 576, quoted in 3 Freeman on Judgments (5th Ed.) p. 2963."

Dean vs. Dean (1931) 136 Oregon 694, 86 A. L. R. 82.

FACTS MIS-STATED IN PETITIONERS' BRIEF

In the argument advanced by attorney Harry J. Lippman will be found many flagrant mis-statements of material facts in this case.

We note only those which we feel are most important in connection with the questions before this court.

(a) Mr. Lippman states:

"This was not an accounting suit" (Brief page 44).

"The land itself was in no manner involved in the controversy, but only the right to enforce a mortgage foreclosure thereon" (Brief page 45).

THE RECORD:

In the Tudryck bill of complaint they alleged that they were "the owners of the fee" of said real estate and premises (Paragraph I of Bill of Complaint, R. 5).

That they had purchased Smyls' interest in the property (Paragraph VI of Bill of Complaint, R. 10).

That they had discharged all of their indebtedness to the bank (Paragraph IX, R. 16 and 17), and prayed that the court decree to them judgment by way of damages against said bank and that execution issue therefor (Paragraph F., R. 25).

They prayed for accounting (25), cancellation of all indebtedness (24), removal of all clouds (25), and for general relief (26). Tudryeks *did not pray* for

the foreclosure of any mortgage, or land contract, but alleged full payment of all indebtedness to the bank. (Paragraph IX, R. 16). See opening statement of Harry J. Lippman (R. 329, reference to page 339).

In Trial Court:

There was accounting upon the trial in open court. See testimony of J. Otis Mutch on pages 311-504 of Record taken on June 14 and 15, 1939. Attorney Harry J. Lippman completed the accounting and reported same to Tudrycks (159).

Michigan Supreme Court found:

"Plaintiffs sought an accounting against defendants J. O. Mutch and Harvey A. Chamberlain, copartners doing business as the Sterling Bank of Sleeper and Chamberlain. Smyl and wife were joined as defendants, although no personal relief was sought against them. The ultimate object of the accounting suit was to secure a determination that plaintiffs were the fee owners of the property involved, and that it was free and clear of all liens and encumbrances." (276 Supplement).

(b) Mr. Lippman states:

"First, this suit was instituted in the Circuit Court for the County of Arenac, Michigan, for the sole purpose of having a certain deed and a certain land contract held between the petitioners Tudryck and the bank construed as a mortgage" (Brief, page 33).

"The bill of complaint was filed for the purpose of having certain documents construed as a mortgage obligation, and for an accounting and reference to that mortgage obligation, * * *" (Brief, page 43).

The Record:

The Tudryck bill of complaint alleged that they had discharged all of their indebtedness to the bank (Paragraph IX, R. 16 and 17), and prayed that the

court decree to them judgment by way of damages against said bank and that execution issue therefor. (Paragraph F., R. 25).

In Trial Court:

From Opening Statement of Mr. Lippman:

"* * * and we say to you that these (Tudrycks) people not only today own this farm here free and clear and discharged of all obligation against it to either this bank or Mr. Mutch, but that in addition this bank and Mr. Mutch are indebted to them and that is for the reason of the accounting that we are going to ask for a hearing, and we hope to be able to convince you by the proofs that we adduce and these clouds upon the title to this land should be removed, and that they should have a conveyance of the fee simple, free and clear of any encumbrance, and a money judgment against the bank and Mr. Mutch for such amount as your honor deems fit for the *amount of moneys that they over-paid this bank* for the value of the property which they have confiscated and for the damage which they have otherwise sustained" (339).

Michigan Supreme Court:

"As a result of the transactions disclosed in the case of Tudryck v. Mutch, the Tudrycks claim that the bank received sums in excess of their indebtedness. They take the position that their indebtedness, having been discharged, the bank and others are wrongfully in possession of the premises; and that they, the plaintiffs, should be declared the fee owners, free of any liens thereon * * *" (277 Supplement).

(c) Mr. Lippman states:

"ninth, the granting of relief under decree as entered in this cause to said H. L. Switzer, permanent receiver, an entire stranger to this proceeding;" (Brief page 34).

"* * * that the relief granted was to one not a party to the suit * * *" (Brief, page 10).

"* * * the said Switzer had not intervened or been substituted in this cause, nor had any proceedings in anyway been taken before this court under the intervention statute, Section 14019 of the 1929 Compiled Laws of Michigan to in any manner bring him into that cause as a proper party defendant" (Brief page 34).

The Record:

That a receiver had been appointed for the bank appears from the petition to intervene filed by Joseph Martin, temporary receiver (84). Harry J. Lippman signed stipulation consenting to the intervention of such receiver (87). John C. Shaffer, Circuit Judge signed the order of intervention of Martin, Receiver (88). The same court had charge of the receivership cause No. 861 (505-534). H. L. Switzer was appointed by the same court to succeed Joseph Martin, temporary receiver (505). Yeo and Bilitzke were appointed attorneys for Switzer, Receiver (529). Stipulation for continuance of the Tudryck case was signed by Yeo and Bilitzke attorneys for H. L. Switzer, Receiver, and Harry J. Lippman attorney for Tudrycks (89). Order of adjournment signed by John C. Shaffer, Circuit Judge, was entered pursuant to said stipulation (89). Harry J. Lippman attorney for Tudrycks served notice to produce certain letters upon Yeo and Bilitzke, attorneys of record for H. L. Switzer, Receiver (91). At the opening of the original Tudryck trial, Yeo and Bilitzke stated upon the record in open court: "Since that time a permanent receiver was appointed and we stand here representing the permanent receiver * * *" (312). Switzer, Receiver, filed in the same court petition for authority to make the settlement with Tudrycks (515). The same trial judge signed the order authorizing Switzer, Receiver, to make the settlement (519).

From the Decree:

"* * * Joseph Martin, Temporary Receiver of said Sterling Bank of Sleeper and Chamberlain, having appeared in said cause, and thereafter appearance having been entered by H. L. Switzer, Receiver of said Sterling Bank of Sleeper and Chamberlain, who succeeded Joseph Martin, Temporary Receiver as aforesaid; * * *" (100).

Tudrycks accepted from Switzer, Receiver, check for $300.00 paid at the time of settlement (527). Tudrycks executed to Switzer, Receiver, quit claim deed (522) of the real estate and premises and assignment of interest in oil and gas lease (525).

Trial Court:

"To call Receiver Switzer a stranger to this proceeding is a misuse of that term and upon that premise to conclude that the decree is void for that reason is pure sophistry" (208).

Michigan Supreme Court:

"Both appellants have suggested that State and Federal constitutional questions are involved, arguing that the decree exceeds the judicial power of the court in purporting to give relief to a permanent receiver who was a stranger to the proceedings. The conclusion as thus stated is based upon a false premise. Both receivers, predecessor and successor, were officers of the court in which the cause was pending; and we have never understood that the authority of a successor receiver, as an officer of the court, can thus be challenged" (281 Supplement).

(d) Mr. Lippman states:

"sixth, the entry of a decree based upon stipulation under preceding number referred to and which decree did in conformity with such stipulation, find the fee of the premises in the bank, with no interest in same in

the Tudrycks or Smyls and directing the payment of the $300 and release of liability as in said stipulation provided;" (Brief, page 34).

The Record:

From the Stipulation:

"4. That decree submitted herewith may be signed and filed in said cause as a final decree entered pursuant *to the testimony* in said cause *and agreement* of said parties as evidenced by this stipulation" (99).

From the Decree:

"* * * default as to said defendants, Andrew Smyl and Victoria Smyl, his wife, having heretofore herein been regularly entered" (100).

"* * * proofs on the various issues involved having heretofore been taken in open court, accounting having been had and thereafter said plaintiffs and H. L. Switzer, Receiver as aforesaid, having agreed upon the settlement of the matter in dispute as will appear from stipulation signed by counsel for said parties now on file in said cause" (101).

Trial Court:

"In the face of all those claims defendants Smyl were defaulted for failure to appear, thus admitting they had no further interest in the premises, and that any accounting concerning the several mortgages and the land contract and any payments made thereon or amounts found due thereon was a matter solely between plaintiffs and defendant bank. Such an *accounting was had in open court* and Andrew Smyl was present. The parties to the accounting reached an amicable settlement which provided for a conveyance to the bank by the plaintiffs upon certain payments by the bank to plaintiffs. Upon *such a stipulation and the testimony so given in open court a decree was entered*" (209).

ANALYSIS OF OTHER QUESTIONS RAISED AND AUTHORITIES CITED IN PETITIONERS' BRIEF

Reynolds vs. Stockton, 140 U. S. 254, (Page 17 of Brief).

The rule approved therein is:

> "The requirements of that section are fulfilled when a judgment rendered in a court of one state which has jurisdiction of the subject matter and of the person, and which is substantially responsive to the issues tendered by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another state."

Standard Oil Company vs. Missouri, 224 U. S. 270 (Page 21 of Brief).

The rule approved therein is:

> "Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and hearing should correspond and that the relief granted should be appropriate to that which had been heard and determined on such notice."

Tudryck case:

Those requirements were fully met in this case. Tudrycks had invoked the jurisdiction of the court; were granted a trial in open court; the property was in the possession of the court through its receiver; Tudrycks had a right to convey their interest in said property and obtain a discharge of any liability owing the receiver.

There is no constitutional provision or state statute which deprived Tudrycks of the right to make settlement during the progress of said cause. The property was in *custodia legis* by reason of receivership proceedings. The prayer for general relief was sufficient to enable the court to make final disposition of the cause.

Michigan Rule:

"Equity having once acquired jurisdiction may retain it to grant complete relief and finally dispose of the controversy." *Whipple vs. Farrar,* 3 Mich. 437.

Rule in Federal Court:

(Syllabus):

"6. The ascertainment whether anything, and if so how much, was due complainants, was well within the *prayer for general relief* in a bill in a suit by attorneys who had rendered professional services in the prosecution of a claim against the United States under contracts whereby they were to receive a certain percentage of whatever might be awarded or collected, to establish and enforce their asserted lien upon the fund made available for the payment of the claim by its final allowance."

(Syllabus):

"5. A cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority."

McGowan vs. Parish, 237 U. S. 285, 59 Law. Ed. 956.

Was the Court without Jurisdiction due to want of due process (Page 14 of Brief).

The trial court had jurisdiction of the subject matter and of the parties. Attorney Harry J. Lippman proceeded with the trial by submitting testimony in the presence of Tudryck and Smyl (311-504). Realizing their indebtedness to the Receiver, and wishing to avoid the possibility of a deficiency decree, the Tudrycks, for a valuable consideration, entered into a settlement agreement with the said receiver (157). Independent of and in addition to the decree, they conveyed their interest to the Receiver by quit-claim deed (522) and assignment of interest in oil lease (525). There is no merit to that question.

Did the Court have jurisdiction of the person (Switzer, Receiver), (Page 27 of Brief).

Tudrycks' attorney had recognized the appointment and appearance of H. L. Switzer, Receiver, successor to Joseph Martin, by signing the stipulation for continuance (89) and serving notice to produce certain papers to be used upon the trial (91). Files of said court contained the orders appointing Switzer, Receiver (505, 529), and appointing Yeo and Bilitzke his attorneys. At the opening of the original trial statement was made upon the record in the presence of attorney Harry J. Lippman, Tudryck and Smyl that Switzer, Receiver, was appearing therein by Yeo and Bilitzke, his attorneys (312). Settlement was made with Switzer, Receiver. Tudrycks accepted moneys from Switzer as receiver and conveyed their interest in said property to Switzer, Receiver. The same court had appointed Switzer receiver. The property was in custodia legis and the receiver was but an officer of the court. There is no merit to that argument.

Jurisdiction was not conferred by consent (Page 32 of Brief).

Tudrycks had instituted the suit against the bank and against Smyls and others and said parties were brought into court by summons (32). It was a court of general jurisdiction in the State of Michigan. The court having jurisdiction of the subject matter and of the parties, it was authorized to confirm the settlement made between Tudrycks and the receiver, officer of said court, and to enter final decree in accordance therewith.

Tudrycks' Bill of Complaint was not filed to foreclose mortgage (Brief, page 26).

On page 26 of brief the petitioners argue that proceedings in equity to foreclose a mortgage are purely statutory. That argument is foreign to any issue in this case. Tudrycks were not asking for foreclosure of any mortgage or contract. They were claiming absolute ownership of said premises. Equity had general jurisdiction of the re-

lief prayed for, namely: accounting, quieting title and discharge of mortgages, and general relief.

Is the 14th Amendment to Federal Constitution — equal protection of law — applicable to this case (Page 38 of Brief).

Because oil was found on said property four years after the time of settlement petitioners argue that this court, under the 14th Amendment, should set aside the settlement and permit them to regain this property. At the time of the settlement this bank was being liquidated by the receiver appointed by the trial court. Dividends of 15% had been paid to the depositors leaving unpaid approximately $160,000.00 not including general receivership expenses. (Affidavit of Martin, Receiver, R. 143). In an effort to avoid a deficiency judgment and decree, and to obtain a complete release from the receiver, Tudrycks proposed settlement. The court authorized the payment of $300.00 from the depositors funds for such purpose. Except for the income from oil from this property, the receiver would be unable to retire the liability to the depositors. Attorney Harry J. Lippman, as an attorney and officer of the court, was a party to that settlement and accepted moneys from Switzer, Receiver, and took from Tudrycks their receipt, as follows:

> "Received of Harry J. Lippman the sum of Three Hundred ($300.00) Dollars, being all the moneys by the said Lippman received in full compromise, satisfaction and adjustment of our claim against J. O. Mutch, et al, as involved in cause entitled Tony Tudryck et al plaintiffs, vs. J. O. Mutch et al, defendants, now and heretofore pending in the Circuit Court for the County of Arenac, Chancery Division, Michigan." Signed, "Mary Tudryck, Tony Tudryck" (163).

To permit Tudrycks to regain this property would result in perpetrating a fraud upon the trial court, administrator of the assets held for the benefit of said depositors.

CONCLUSION

The decision below is correct and there is no warrant for review of the question presented by the petition. The petition should, therefore, be denied.

Respectfully submitted,

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April 1948.